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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FELIX ISMAEL BARRAZA,

Defendant and Appellant.

D073966

(Super. Ct. No. SCE369043)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Affirmed in part, reversed in part, and remanded with directions.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Collette Cavalier, Deputy Attorney General, for Plaintiff and Defendant.

A jury convicted Felix Ismael Barraza of eight counts of committing a lewd act upon a child under 14 years old (Pen. Code, § 288, subd. (a))¹, hereafter section 288(a) and one count of committing a forcible lewd act upon a child under 14 years, (§ 288, subd. (b)(1), hereafter section 288(b)(1)). The jury also found true the allegation that each of the offenses involved substantial sexual conduct within the meaning of section 1203.066, subdivision (a)(8).

At the sentencing hearing, the court imposed a total prison term of 32 years, consisting of the upper term of eight years for the first section 288(a) conviction, one-third the middle term of two years for each of the other seven section 288(a) convictions, and a consecutive full term of 10 years for the section 288(b)(1) conviction. Barraza filed a timely notice of appeal.

Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. In that brief, counsel indicated she could not identify any arguable issues for reversal on appeal and asked this court to review the record for error as mandated by *Wende*. As part of our review, we solicited supplemental briefing from the parties on the issue of whether the trial court erred in sentencing Barraza to a full, consecutive term for his section 288(b)(1) conviction pursuant to section 667.6, subdivision (d). The parties agree the trial court erred and Barraza must be resentenced. Accordingly, we vacate the sentence and remand for resentencing.

¹ All subsequent statutory references are to the Penal Code.

FACTUAL BACKGROUND

The facts underlying Barraza's convictions are not germane to the sole issue on appeal and we need not provide an in-depth discussion. All of the charged offenses arise from Barraza's inappropriate sexual contact with his wife's young cousin, who began living in the same house as Barraza when she was 11 or 12. Given the victim's age and the delay between the time of the offenses and Barraza's arrest and trial, the precise date on which each offense occurred was not established at trial.

Barraza was charged and convicted of eight counts of committing a lewd and lascivious act upon his victim when she was under 14 years of age in violation of section 288(a). The ninth count for committing a forcible lewd act upon a child in violation of section 288(b)(1) arises from one occasion in which Barraza physically restrained his victim against her will and sodomized her.

At the sentencing hearing following Barraza's convictions on all counts, the prosecution asserted section 667.6, subdivision (d) required a mandatory consecutive sentence for the forcible lewd act conviction. Defense counsel agreed.

The court imposed a sentence consisting of eight years for the first section 288(a) conviction, two-year consecutive subordinate terms for each of the other seven convictions under section 288(a), and a consecutive term of 10 years for the section 288(b)(1) conviction.

DISCUSSION

Considering that the *Wende* brief filed by appellate counsel raised no arguable issues, the supplemental briefing filed in response to our request raises the sole arguable issue on appeal, which concerns whether section 667.6, subdivision (d) applies here to mandate the trial court impose a full consecutive term for the conviction under section 288(b)(1).

Section 667.6, subdivision (d) provides that "[a] full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve . . . the same victim on separate occasions."

As applied here, Barraza's offense under 288(b)(1) is listed in subdivision (e) of section 667.6, but the other offenses under 288(a) are not. Based on the prosecution's representation and defense counsel's acquiescence, the trial court applied section 667.6, subdivision (d) when imposing Barraza's sentence.

In their respective supplemental briefs, both parties agree the court erred in doing so. We concur. Section 667.6, subdivision (d) applies only when the defendant is convicted of two or more offenses listed under subdivision (e). (*People v. Rojas* (1988) 205 Cal.App.3d 795, 798-799.) In *Rojas*, the court concluded that section 667.6, subdivision (d) "constitutes a mandatory consecutive sentencing scheme applicable only when a defendant has been convicted of two or more enumerated sex offenses." (*Rojas*, at p. 799; see also *People v. Jones* (1988) 46 Cal.3d 585, 595-597; *People v. Goodliffe* (2009) 177 Cal.App.4th 723, 727, fn. 10 (*Goodliffe*). Because Barraza was convicted of

only one enumerated offense, the court erred in sentencing him in accordance with section 667.6, subdivision (d).

Despite conceding the trial court erred in finding it *must* impose a full consecutive sentence pursuant to section 667.6, subdivision (d), the Attorney General contends the trial court *may* impose a full consecutive sentence under section 667.6, subdivision (c), if the court finds the section 288(b)(1) offense "involve[s] the same victim on the same occasion" as one of the other section 288(a) offenses. (§ 667.6, subd. (c); *Goodliffe*, *supra*, 177 Cal.App.4th at p. 732.)

It is undisputed that all of Barraza's offenses involve the same victim, but Barraza contends on appeal that section 667.6, subdivision (c) does not apply here because each offense occurred on a different occasion.

Whether section 667.6, subdivision (c) applies in this case turns on a factual determination that should not be decided in the first instance on appeal. The trial court never exercised its discretion to determine whether subdivision (c) applied because it sentenced Barraza based in part on its belief that the consecutive term was mandatory. When legal error precludes a trial court from resolving a factual issue, the prudent course is to remand the matter to the trial court to resolve the factual issue in the first instance rather than divesting the trial court of its discretionary power by deciding the matter on appeal. (See, e.g., *In re Charlissee C.* (2008) 45 Cal.4th 145, 167.) "On remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 893.) Accordingly, we remand to the trial court to conduct

a new sentencing hearing on all counts to afford an opportunity to exercise its discretion in determining the proper sentence in this case.

DISPOSITION

Barraza's sentence is vacated and the matter is remanded for resentencing consistent with this opinion. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.